CRIMINAL APPEAL No.27 OF 1988

Against the judgement and order dated 10th of December, 1987 passed by the 2nd Additional Sessions Judge, Bhagalpur in Sessions Case No. 143 of 1981.

DHIRAJA YADAV & ORS --------- Appellants

Versus

STATE OF BIHAR --------- Respondents

Advocates for Appellants :- Mr. Shiv Shankar Sharma, Adv
Mr. Kalyan Shankar, Adv
Mr. Pawan Kumar Choudhary, Adv
Mr. Monaj Kumar Mishra, Adv
Advocates for State :- Mr. Lal Kailash Bihari, Sr. Adv.

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P R E S E N T

THE HON'BLE JUSTICE SMT. MRIDULA MISHRA
THE HON'BLE MR. JUSTICE SHAILESH KUMAR SINHA

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Shailesh Kumar Sinha,J The above appeal is directed against the judgement and order dated 10th of December, 1987 passed by the 2nd Additional Sessions Judge, Bhagalpur in Sessions Case No. 143 of 1981 convicting the appellants for offence under Section 302 read with section 34 of the Indian Penal Code. All the appellants upon their conviction as aforesaid were sentenced to undergo rigorous imprisonment for life.

2. Shortly stated, the prosecution case, in brief, as per the fardbeyan of the informant Jhagru Mandal (P.W 3) the basis of recording of the formal first information report (Ext.2) on 4.2.1980 at 4.00 A.M. by the Officer-in-Charge of Sabour Police Station, District- Bhagalpur, is to the effect that on the last night (3.2.1980) at about 8 PM he was going on

his land in Mauza Gohario with meal for his father-in-law. While he reached at a distance little away from his land he saw on flash of his torch that four persons were assaulting his father-in-law, Aghani Mandal who was crying naming Sundar Babu (appellant no.4) as to why he is assaulting an old man. The informant, Nage Yadav son of Ghuni Yadav holding 'Shaif' in his hand, Sundar Yadav son of Ghasan Yadav holding 'lathi' in his hand, Dhirja Yadav son of Tarun Yadav holding lathi in his hand and Jahindra Yadav son of Rameshwar Yadav holding lathi in his hand, all residents of village Agarpur, were assaulting his father-in-law. On hulla being raised by the informant, Sundar Yadav (appellant no.4) accosted the informant to come near him who will also be assaulted. The informant while raising hulla fled towards his village. On his hulla nearby villagers namely, Juthan Mandal (P.W.5), Mahendra Mandal (P.W.4) and Bhuneshwar Mandal (P.W.2) came running and saw the accused persons fleeing away. The further case is that the deceased Aghni Mandal told the informant as well as the above three witnesses that Negwa, Dhirja, Jahindra and Sunder Yadav have assaulted him and further told them to take him quickly to the doctor as he apprehended he will not survive anymore. While they were taking the injured to the doctor at Goharia he (Aghani Mandal) died in the way. The informant claimed that the reason for the occurrence is that about three years back the informant as well as villagers had purchased land from one Banshidhar Dhandhania for which the aforesaid accused persons were fighting which had led fight (marpit) between them some time back and a case was also registered. His further claim is that they were negotiating for purchase of rest of the land from

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Banshidhar Dhandhania over which the accused persons were claiming possession and on account of this enmity the father in law of the informant has been killed.

3. On the basis of the aforesaid fardbeyan of the informant the first information report (Ext.2) registered against the appellants under sections 302/34 I.P.C. vide Sabour P.S.Case No. 2/80 and the case was entrusted to A.S.I Birendra Mohan (P.W.9) for investigation. The Investigating Officer inspected the place of occurrence, took the dead body into custody and prepared the Inquest Report (Exhibit-5) in presence of Bhuwaneshwar Mandal (P.W2) and Gulab Mandal (not examined) who put their signatures on the same vide Exhibits 4/2 and 4/3 respectively. The dead body was sent for post mortem. The autopsy over the dead body was done by Dr. Ambuj Kumar Choudhary (P.W.7) who prepared the Post-mortem Report (Exhibit-1). The investigating officer recorded the statement of the prosecution witnesses no. 1 to 6. Further investigation of the case was taken up by A.S.I. Binda Prasad (P.W-8) who arrested the accused Jahindra Yadav (Appellant No. 3) and after obtaining the instructions of his superior officers, submitted the charge sheet for committing the offence under Section 302/34 of the Indian Penal code against the appellants. The case was committed to the Court of Sessions for trial. The appellants were put on trial for the charges under Section 302/34 of the Indian Penal Code framed against them on 7th of August 1984. The charges were explained to each of the appellants by the trial court.

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4. All the accused persons on hearing the charge denied the

same and claimed to be tried

5. The prosecution, in order to bring home the charges as aforesaid examined altogether nine witnesses.

P.W-1, Haricharan Mandal, (co-villagers) P.W-2, Bhuneshwar Mandal, (co-villager) P.W-3, Jhagru Mandal (Informant), P.W-4 Mahendra Mandal and P.W. 5, Juthan Mandal, (co-villagers). PW-6, Chunchun Mandal. P.Ws. 4 & 6, however, were tendered for cross-examination and there is nothing worth considering. P.W-7, Dr. Ambuj Kumar Choudhary is the doctor who conducted autopsy on the body and prepared the Postmortem Report (Ext.1). P.W-8, Binda Prasad A.S.I. who had taken up the further investigation at the fag end from P.W9 and submitted the charge sheet against the appellants.

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6. Upon analysing the evidence of the prosecution witnesses, on the point of assault on the deceased causing his death, P.W-3 Jhagru Mandal (Informant) claimed to be the only eye witness to the occurrence. The assessment of the evidence of P.W-3 shall be discussed later. P.W-4 and 6 were tendered for cross examination by the prosecution. There is nothing worth considering in their cross-examination. The material witnesses are P.Ws -1, 2, 3 and 5 besides the doctor (P.W-7) and I.O. (P.W-9). P.W.-8 the second I.O. is a formal witness who has submitted the charge sheet. P.W-1 Haricharan Mandal a co-villager, deposed that at the time of occurrence, he was sitting in his land at a distance of about 150 hands from the place of occurrence. He heard the hulla coming from the North. He immediately went with torch light in the said direction towards the place of occurrence where he saw all the appellants (accused persons of

Mouza Agarpur) were fleeing away towards the west. This witness on reaching the place of occurrence claimed to saw that the deceased (Aghni Mandal) in injured condition and also saw the informant was present there. He learnt the name of the accused persons from the informant as well as from the injured. He has identified the accused persons in Court. P.W-1 in paragraph-2 of the cross-examination has denied any land dispute between the accused persons and the vendor of the informant namely Bansidhar Dhandania. He said that he identified the accused persons while fleeing away hurriedly, from a distance of about 50 hands. The accused persons were wearing Dhoti and Kurta. He however did not attempt to chase them. He has denied the suggestion that he has given false evidence so that the accused persons could be dispossessed from the land in possession of the vendor of the informant and his co-villagers. This witness, as such, has not seen the assault on the deceased, he claims to have seen accused fleeing.

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7. P.W-2 Bhuneshwar Mandal claims to be sitting near the well of Bansi Babu alongwith PW-4 Mahendra Mandal and P.W-5 Jhutan Mandal talking among themselves and from there they went towards the place of occurrence. The above P.Ws claims to have seen Aghani Mandal (deceased) lying on the land where the occurrence took place from a distance of two Rassi (One Rassi is equal to about 100 hands). He saw that the informant was going near the deceased with his meal. After 4/5 minutes he heard hulla raised by the deceased and the informant. Thereafter, all the above three P.Ws with torch light ran towards the deceased and saw that all the accused persons were fleeing away towards the West. On reaching near the deceased they saw him fallen on the

ground in injured condition. The above three P.Ws. 2, 4 & 5 claimed to know the name of the accused persons from the deceased who assaulted him and fled away. The witnesses have identified the accused persons in Court. P.W-2 in Paragraph-9 of the cross-examination deposed that he had seen some blood on the cloth of the deceased on reaching near him. Thereafter, PW-2 along with P.Ws-3, 4 and 5 carried the injured to the darwaja of the informant (PW3), PW 2 returned thereafter back to his house. He also claims to have seen some blood on the ground at the place of occurrence. The witness claimed to have said that the police had taken his statement and had said to the police what he has seen as stated above.

8. P.W.3 Jhagru Mandal is the informant. The informant on the point of assault has supported the prosecution case claiming to be an eye witness. He has deposed that when he reached on his land he saw that his father-in-law (deceased) was being assaulted by the accused persons(appellants), residents of village Agarpur one mile away from his village, to whom he claimed to have identified in the light of his torch in his hand. He further said that the deceased was telling the accused Sunder Yadav (appellant) as to why he is assaulting an old man. On the hulla being raised by him, P.Ws. 1, 2, 4, & 5 arrived and all the accused fled. The above P.Ws went near his father-in-law (deceased) who was then in sense. The witness P.W.3 has further deposed that he as well as his deceased father-in-law disclosed the name of all the four accused persons to the above prosecution witnesses. He also said that the deceased (father-in-law) used to stay with him and further he used to remain almost day and night in the hut of Kaleshwar Yadav which is at a distance of about 15-

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20 hands, for watching the informant's land. In paragraph 12 of this deposition the witnesses has said that he heard halla while was near the above hut. He went from there with lighted torch in his hand and when he moved 5 hands from the hut towards his land he recognized the accused persons who had started fleeing. The aforesaid witnesses P.Ws 1,2,4 and 5 reached at the place of occurrence within 5-7 minutes. He has further said that at the time he could see his father-in-law, he was already lying injured on the ground. The deceased at the material time was having a Chadar on his body and he used to sleep on Pual (straw). P.W.3 in paragraph 16 of his cross examination has categorically stated that the deceased did not use to keep any lantern or torch with him. The informant claims to have shown his torch to the police who after seeing returned it to him. The witness has said that at the time of occurrence his father-in-law was having Chadar and a Gamchha (towel) on his body having blood stains. He has denied the suggestion that his father-in-law became unconscious immediately after the assault and was not in position to speak. The witnesses identified the accused Sundar Yadav and Nago Yadav and claimed to identify the other two accused who were not in attendance. The informant with the help of the witnesses brought his father-in-law at his house and gave water for drinking which he drank and thereafter at about 8.45 P.M. on the same day they had taken him to the doctor, however he was found dead in the way. Thereafter he left the dead body of his father-in-law and went to the police station with the chowkidar namely, Ganesh Paswan (not examined). Thereafter police came and took possession of the dead body, prepared the Inquest Report (Ext.5) and also seized some

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blood stained soil as well as the Gamchha stained with blood of the deceased. Police however, did not send either blood stained Gamchha or soil for the chemical examination vide para 8 of the deposition of the I.O. (P.W.9)

9. PW5 Juthan Mandal ran towards the land of the informant and identified the accused persons holding lathi in their hands, in the light of their torch and saw them fleeing towards the West. On reaching the place of occurrence, the witnesses found that the Aghani Mandal (deceased) was fallen on the land in injured condition with injury on his head on the front and on the back as well as on the on the right hand. At that time the injured was in sense. He has further deposed that on being asked by P.W2 (Bhuneshwar Mandal) as to who are the persons who assaulted him, the injured replied that all the accused persons namely, Nago Yadav, Dhirja Yadav, Sundar Yadav and Jahinder Yadav have assaulted and injured him. He has further said that witnesses carried the injured to the house of the informant and they were trying to take him to the hospital. However, the injured died at the house of the informant. He has identified accused Nago Yadav and Jahinder Yadav in court and claims to identify the rest two accused persons on seeing. In cross-examination the witnesses have given configuration of details of their lands as also the land of near by persons as well as the land of the informant (P.W3).

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10. P.W7 is Dr. Ambuz Kumar Chuwdhury who conducted autopsy on the dead body of the Aghani Mandal, aged about 65 years and found following ante mortem injuries on the deceased.

1. Lacerated wound 2”x1/2” x bone deep on right occipital region on dissection underlined tissues were infiltrated with blood and blood clot.
2. Lacerated wound 3”x1”x bond deep on right temporal region. On dissection underlined tissues were infiltrated with blood and blood clot. On opening the skull extramural haemotoma was present.
3. Deformed right wrist having swelling 3”x2”. On dissection underlined tissues were infiltrated with blood and blood clots. On further dissection there was fracture on lower radius and ulna.
4. Compound fracture of right upper arm and broken bone was shaft of humer was exposed to the exterior. On dissection underlined tissues were infiltrated with blood and blood clots. On further dissection there was fracture of shaft of humer.
5. There was rapture of right kidney and spleen.
6. Lacerated wound ½” x ½” on the left of the tibia

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11. The doctor opined that all the above injuries were caused by hard and blunt substance which may be lathi. Injury Nos. 1 and 2 were sufficient to cause death of the victim in the ordinary course of nature. The doctor further opined that after receiving the above injuries, the victim is not likely to become unconscious then and there and he will become unconscious after sometime. The post mortem report prepared by him is on record as Exibit -1.

12. P.W8 Binda Prasad, Assistant Sub Inspector of Police, who had taken up the investigation of the case at the fag end on his joining on 27.07.1980 and made arrest of one accused Jahinder Yadav. Since the investigation was completed he has submitted the charge sheet on receiving the instructions from the higher official.

13. PW9 Birendar Mohan, the officer-in-charge of Gora Nagar Police Station, who was posted in Sabour Police Station on 4.02.1980 had taken up the investigation of the case, the FIR of which was recorded by the Officer-in-charge on 4.02.2008 at 4 a.m. at the said police station by Basim Khan. The FIR has been marked as Exibit -2. During investigation he recorded the restatement of the informant PW3 visited the place of occurrence (Mouza Goharial, Jagarnathpur) in the morning at about 8 a.m. On the same day, he inspected the place of occurrence in presence of the informant. P.W3 saw that the crops were ripe in the land where the occurrence took place and further saw that in the area of about 4 yards, the crops were found smashed. He also found blood there on the ground and also a blood stained Check gamcha. He seized those materials in presence of the witnesses Bisheshwar Mandal (not examined) and Mahendra Mandal (P.W4) and prepared the seizure list (Ext.-3). The signatures of the witnesses are marked as Ext.4 and 4/1 respectively. The I.O inspected the house of the informant and prepared inquest of the deceased in presence of the witness P.W2 and 1 Bhulani Mandal. The signature of P.W2 Bhulwa Mandal over the inquest report (Ext.5) was marked as exibit 4/2 and 4/3 respectively. Thereafter, the

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I.O. prepared the dead body challan and sent the body for post mortem. He recorded the statement of P.W1, P.W2, P.W4, P.W5 and P.W6. He further deposed that he visited the house of the accused Jahindra Yadav and from there he seized one Bamboo lathi which was blood stained towards thicker end of the same it was seized in front of the witnesses which was marked as Exibit 3/1 and signature of the seizure list witnesses Bhital Yadav and Mohammed Razi were marked as exhibit 4/4 and 4/5 respectively. In cross-examination, the I.O admits that he did not send the blood stained lathi, soil and gamcha for chemical examination for which no explanation was offered. He also did not prepare sketch map of the place of occurrence. He found the hut on the open land at the distance of about 20 yards south-west. From there also he did not seize any article. He has confirmed that the informant during his restatement has repeated his version what he had got written in the first Information Report. However, he did not record the statement of the informant in his diary verbatim. The witness in Paragraph 14 has denied that P.W2 Bhuvneshwar Mandal (not Umeshwar Mandal) had said that well (where he was sitting) was at the distance of two rassi from the deceased. However, he has said that P.W1 stated before him that he ran with torch light from the well. Similarly, the I.O. in paragraph 15 has said that P.W5 Juthan mandal did not say to him that he had seen the injury on the deceased on his front and back side of head and he had only mentioned about injury on the right hand of the deceased. However, he had said that at the time when the prosecution witnesses reached near the deceased, he was in sense.

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14. All the accused persons were examined under Section 313 of the Code of Criminal Procedure They denied the commission of the offence alleged

15. In this case the place of occurrence, fact of killing of the deceased Aghani Mandal is an admitted fact. The motive for such killing is said to be the purchase of land from one Bansidhar Dhandhania and possession about the same, as well as, for purchase of additional land from the said Bansidhar Dhandhania by other co-villagers over which the accused persons were allegedly in possession. However, in face of the clear stand of the informant that he had no proposal for purchase of the rest of the land from the Bansidhar Dhandhania on which the accused persons were alleged to be in possession, there does not appear any convincing reason for committing the murder of the father-in-law of the informant by the accused persons since there could be no grievance against the informant or his father-in-law in connection with proposed purchase of rest of the land by co-villagers of the informant. As regards witnessing the actual assault, it is an admitted position that the date and time of occurrence is 3rd of February 1980 at about 8 P.M. in the night. It is further admitted position that the place of occurrence where the Aghni Mandal (deceased) was watching the land there was no lantern or torch available with the said Aghni Mandal. As such identifying the accused persons by Aghni Mandal who were assaulting him becomes doubtful in absence of any source of identification in the night of winter at about 8 p.m. More so, when the accused persons admittedly belong to another village and there is no evidence on the record that they were on visiting

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terms with the informant or the deceased. As regards the fact of witnessing the assault, the informant, PW3, has deposed in paragraph 11 of his cross-examination that he had no hut in his land but he heard the hulla from the hut of one Kaleshwar Yadav (not examined) which is at a distance of about 15-20 hands, from his land. He has further admitted that from the aforesaid hut he did not identify any of the accused persons. He identified the accused persons when he went 5 hands ahead from the said hut. At the time when he saw his father-in-law already injured lying on the ground and by that time the accused persons had started fleeing away from the place of occurrence. There is no evidence of the P.W3 that the accused Surendra Yadav accosted him as mentioned in his fardbeyan. After 5-7 minutes P.Ws 1, 2,4, and 5 reached the place of occurrence and saw that all the accused persons were fleeing.

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16. He has further admitted that at the time when he saw his father-in-law, he had already fallen on the ground. He has denied the suggestion that after assault his father-in-law immediately became un-conscious. He has said that at about 8.45 P.M. he, along with the aforesaid witnesses, had taken his father-in-law for treatment to the place of doctor and there they found him dead. They left the dead body on cot and with the chowkidar went to the police station.

17. On close scrutiny and consideration of the evidences of the above prosecution witnesses it would appear that P.W3, the informant Jhagru Mandal, has deposed in paragraph 8 of his deposition that when he reached on his land he claims to have seen that accused persons assaulting his father-in-law and claims to have identified them in torch

light. He also claims to have heard telling his father-in-law to the accused Sundar Yadav as to why he assaulted the old man and on hulla being raised by the informant the witnesses namely P.W1 P.W2, P.W4, P.W5 and others reached the place of occurrence. The accused persons seeing the witnesses coming fled away. Thereafter, he went near his father-in-law, the injured, who told the name of all the accused persons who had assaulted. The informant, P.W3, has also deposed that his father-in-law died while he was being carried to doctor's place; however, he died in the way. On the other hand P.W3 in paragraph-12 deposed that he did not identify the accused persons from the hut of Kaleshwar Yadav which was at a distance of 15-20 hands from the place of occurrence. However, he claimed to have identified the accused persons when he moved 5 hands away from the hut and when he reached on his land he saw that his father-in-law was already injured lying on the ground and by said time the accused persons had started fleeing. P.W3 has further stated to the effect that the aforesaid witnesses i.e P.W1, 2, 4 and 5 reached the place of occurrence within 5/7 minutes when the accused persons fled away. On the other hand, all the P.Ws on the point of occurrence i.e. P.W1 Haricharan Mandal, P.W2 Bhuneshwar Mandal, P.W5 Jhuthan Mandal and P.W4 Mahendar Mandal (tendered only for cross-examination) claimed to have seen the accused persons while fleeing away when they reached at the place of occurrence. The aforesaid witnesses did not see the accused persons assaulting the deceased Aghani Mandal. The other important aspect of the matter is that admittedly the claim of the informant, P.W3, that he heard the deceased crying from a distance of

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about 10/15 hands away from the place of occurrence that his father-in-law was assaulted by the accused Sunder Yadav as to why he is assaulting whereas admittedly in the winter night at about 8 p.m. in absence of any source of light, the claim of identification of unfamiliar accused persons is not convincing, reliance on such identification becomes doubtful and not safe. Therefore, the claim of identifying the accused persons by the deceased, Aghni Mandal as well as by the other witnesses becomes doubtful. On perusal of the evidences of the above witnesses the identification of accused persons by the deceased as well as the claim for identification by the informant P.W3 as well as the aforesaid P.Ws 1,2,4 and 5 either on the place of occurrence or while the accused were fleeing away also becomes unacceptable and it may not be safe to sustain the charge of murder. In this regard the evidence of investigating Officer P.W9, Birendar Mohan in paragraph 11 of his deposition is that a hut was found at a distance of about 200 yards from the place of occurrence towards the south west whereas the informant P.W3 claimed that the hut was at a distance of 15-20 hands from the place of occurrence. The I.O. has further deposed in paragraph 14 and 15 of his deposition that P.W2 did not say the police in his statement under Section 161 of the Cr.P.C. during investigation that he ran from the well where he was sitting with lighted torch light towards the place of occurrence which at a distance of about 2 rassi. He has further said that the P.W5, Juthan Mandal had not given the statement before him about the injury sustained by Agani Mandal on his head in front and in back side as well as did not mention any injury sustained on the right hand, therefore, taking the entirety of the

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evidences of the witnesses it appears that it would not be safe to rely on the evidence of the prosecution witnesses on the point of manner of occurrence. It appears that the deceased was killed in some other manner and not as alleged by the prosecution.

18. It is on the record that as per the report received from the Superintendent of Police, Bhagalpur vide Memo No. 93 dated 21st February 2008 pursuant to the order of this court that the appellant no. 3, Jahinder Yadav died on 2.11.2007 and the appellant no. 4, Sundar Yadav had died about 10 years back.

19. Considering the materials on the record and on perusal of the evidences of the prosecution witnesses brought on the record, I find that prosecution has failed to prove the charges beyond all reasonable doubts and therefore, no conviction can be sustained on the evidences discussed above. Accordingly the above appeal of the appellants is allowed. The judgement and sentences under the appeal convicting the appellants for the charges under Section 302/34 and sentencing them of rigorous imprisonment for life is set aside. The appellants are discharged forthwith of the liability of their bail bonds.

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(Shailesh Kumar Sinha, J.)

Mridula Mishra,J

(Mridula Mishra,J)

Patna High Court
The 22nd May, 2008
N.A.F.R/ Jagdish

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